

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

No. 77-1755

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

PAUL W. MERCER and FLORENCE L. MERCER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States

Paul W. Mercer

Pro Per

Address:

L & M Building, Suite 1

4014 N. 7th Street

Phoenix, Arizona 85014

Pro se

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

RICHARD A. WILSON and SHARON L. WILSON,
et al., Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice
and Associate Justices of the Supreme Court
of the United States.

Richard A. Wilson and Sharon L. Wilson,
et al., Petitioners herein, pray that a writ
of certiorari issue to review the opinion
of the United States Court of Appeals For
The Ninth Circuit entered in the above-
entitled case on November 25, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals For The Ninth Circuit is unreported and is printed in Appendix A hereto, infra, page ____.

JURISDICTION

The opinion of the United States Court of Appeals For The Ninth Circuit (Appendix A hereto, infra, page ____) was entered on November 25, 1977. A timely petition for rehearing was denied on January 13, 1978.

The jurisdiction of this Court is invoked under Rule 1254 of the Supreme Court Federal Rules of Jurisdiction and Venue.

QUESTIONS PRESENTED

What are the minimum requirements of notice which is not violative of the due process clause of the constitution of the United States?

Whether the tax court was correct in dismissing Petitioners' petition as to John Does 1-5 and Jane Does 1-5 for lack of jurisdictional prerequisite of deficiency notice being sent on the one hand, then denying Paul W. Mercer and Florence L. Mercer's motion to amend on the grounds that the motion was untimely filed, in that the 90 day period had expired, the time frame being identical in both instances.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6212. NOTICE OF DEFICIENCY

(a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606 and Sec. 101(j)(40), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] In General.-- If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 42, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) [as amended by Sec. 101(j)(41) Tax Reform Act of 1969, supra] Address for Notice of Deficiency. --

(1) Income and gift taxes and taxes imposed by chapter 42. --In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, or chapter 42 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 42 and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(2) Joint income tax return. -- In the case of a joint income tax return filed by husband and wife, such notice of

deficiency may be a single joint notice, except that if the Secretary or his delegate has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

(3) Estate Tax. --In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 11, if addressed in the name of the decedent or other person subject to liability and mailed to his last known address, shall be sufficient for purposes of chapter 11 and of this chapter.

(c) [as amended by Sec. 101(f)(2), Tax Reform Act of 1969, supra, and Sec. 102(d)(5), Excise, Estate, and Gift Tax Adjustment Act of 1970, P.L. 91-614, 84 Stat. 1836] Further Deficiency Letters Restricted. --

(1) General Rule. --If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar quarter, of estate tax in respect of the taxable estate of the same decedent of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under

4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical errors), or in section 6861 (c) (relating to the making of jeopardy assessments).

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) [as amended by Sec. 101(j)(42), Tax Reform Act of 1969, supra] Time for Filing Petition and Restriction on Assessment. --Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition

is in force may be enjoined by a proceeding in the proper court.

Due Process Clause, United States Constitution;

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioners herein filed a Petition for Redetermination of Tax Deficiency with the U.S. Tax Court on July 9, 1976, based upon Notices of Deficiency issued to Petitioners by Internal Revenue Service.

Petitioners then amended their petition on July 13, 1976. (Reference being made to Paul W. Mercer and Florence L. Mercer)

Respondent United States Tax Court moved to Dismiss for Lack of Jurisdiction as to John Does 1-5 and Jane Does 1-5 named in Petitioners' petition, on August 23, 1976, alleging no notices had been sent to form a basis for appeal to the Court.

Petitioners filed their Objections to Respondent's motion on September 22, 1976. Also on said day, Petitioners, Paul W. Mercer and Florence L. Mercer moved the Court for Leave to File a Second Amendment to Petition to include the matter of the Statement of Tax Due received by said

petitioners on September 6, 1976, concerning the tax year 1971.

Respondent filed its' Notice of Objections to Petitioners' motion.

Petitioners, on October 26, 1976, filed their Statement in Lieu of Personal Appearance for the hearing set for November 3, 1976.

All motions were heard before the Honorable Howard A. Dawson on November 3, 1976 at Washington, D.C. The Court rendered its' Order upon said hearing, granting all of Respondent's motions and denying all of Petitioners'.

Petitioners thereafter, on November 30, 1976, filed a Motion for Reconsideration of Findings. The Court denied said motion on December 6, 1976.

Petitioners then filed Notice of Appeal to the U.S. Court of Appeals For the Ninth Circuit on January 11, 1976.

ARGUMENT

Petitioners in this case deny receiving notice of any deficiency concerning the tax year 1971 before September 6, 1976, when they received a Statement of Tax Due.

Petitioners have presented sworn affidavits to the Court, setting forth specific facts evidencing that they had no notice prior to the said date of September 6, 1976. Petitioners affidavits were given no weight or consideration by the Court. Said affidavits were uncontroverted by Respondent. By the very nature of being uncontroverted, by the substantive law of Arizona, the affidavits must be taken as judicially admitted. The Court must follow the substantive law of the State of Arizona. The substantive law of Arizona being, as stated supra, that affidavits, when uncontroverted, are judicial admission of the truth.

Compton v. National Metals Co., 10 Ariz. App. 366, 459 P2d 93, Also see Swansea Properties, Inc. v. Hedrick, 3 Ariz. App. 594, 416 P2d 1015.

Respondent has shown, by testimony given, that, in fact, it was within Respondent's particular knowledge that said notice had not been received by Petitioners.

The very essence and essential elements of Due Process of Law requires that there be notice and an opportunity to be heard in defense thereof. Anything short of this opportunity to be heard and present evidence in defense is clearly deprivation of Petitioners' constitutional rights.

Case law clearly upholds Petitioners' position that notice, to be proper and effective, must be received to afford a just hearing before a substantial right granted by statute can be taken away or modified.

An elementary and fundamental requirement of due process in any proceeding which

is to be afforded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Schroeder v. New York City, 89 ALR 2d 1398, 371 US 208, 9 L Ed 2d 255, 83 S Ct 279.

Petitioners had no notice until September 6, 1976, and their motion to include this notice, as to tax year 1971, filed on September 22, 1976, was timely made and they, therefor, should be given an opportunity to be heard in defense of said notice.

The Tax Court had denied Petitioners the opportunity to be heard in defense of a Notice of Deficiency as to the taxable year 1971. The Court's denial is based upon its' erroneous presumptions, which petitioners contend they have rebutted by evidence.

The Court determined that petitioners had been afforded Due Process of Law. However, evidence presented herein clearly shows that the Court has made its' determination upon only presumptions.

Respondent has taken conflicting positions in pleadings in this case. First Respondent filed a Motion to Dismiss for Lack of Jurisdiction upon the grounds that no notices were sent which would place any other matter before the jurisdiction of the Court, and then turns around and bases its' objections to petitioners' filing a second amendment to their petition upon the grounds that notices were given and that said notices were received by petitioners and that petitioners did not move timely to include the notice as to the taxable year 1971, and therefor could not place it in issue before the Court, all the time knowing that petitioners did not receive the Notice concerning 1971. These acts

upon the part of Respondent would certainly appear to petitioners to violate the common law doctrine of fairness.

The presumption that notice, having been mailed, is received, can and has been rebutted by specific, uncontroverted evidence that such notice was, in fact, not received. The presumption of due receipt of a letter or other mail may be rebutted by evidence that it was not in fact delivered or received. Traders & General Ins. Co. v. Malitz, C.A. La., 315 F 2d 171. Also see Arkansas Motor Coaches v. C.I.R., C.A. 8, 198 F 2d 189.

In Cohen v. United States, 297 F 2d 760 (C.A. 9, 1962), cert. denied, 369 U.S. 865 (1962), the court cites Tenzer v. Commissioner, 285 F 2d 956 (1960) stating:

"In that case notice was sent by registered mail and returned to the government; personal service of notice was then made. We concluded, citing Boren, and the dissent in Dolezilek, that the 90

days ran from the time of personal service, basing our holding on considerations of fairness, and stating: 'when the Commissioner chose personal service, he abandoned the other method.' (p. 958)."

The point Petitioners wish to make in this quote is that the Court bases its decision upon fairness. See Boren v. Riddell, 241 F 2d 670 (C.A. 9, 1957).

Petitioners would strongly urge that the fundamental purpose of the doctrine of constitutional due process of law is to afford any aggrieved party not only notice but also an opportunity to a hearing. Although, statutory provisions for notice as to tax matters is not as stringent as in other court jurisdictions, notice must be received to be effective.

In discussing what is due process of law (in Davidson v. New Orleans case) Justice Bradley is quoted in People v. Skinner, 149 ALR 299, 18 Cal 2d 349, 115 P2d 488, at page 493,

"In judging what is due process of law, respect must be had to the cause and the object of the taking-- whether under the taxing power, the power of eminent domain, or the power of assessment for local improvement or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law."

Petitioners would point out that Respondent appears to feel that there is a distinction between due process with regard to the Tax Court and due process with regard to all other judicial levels. However in the case of O'Brien v. Commissioner, 62 T.C. 543 (1972), it was pointed out by the U.S. Court of Appeals For the Ninth Circuit in their quotation from the Supreme Court's opinion in Robinson v. Hanrahan, 409 U.S. 38 (1972) that there is an elementary and fundamental requirement in any proceeding, which would indicate that the measure of due process is identical, whether involving a tax case

or otherwise.

Petitioners strongly urge that not only are the actions of Respondent, set out supra, clearly against the common law doctrine of fairness, but that in the case before this Court, the decisions of the lower court are arbitrary, oppressive and unjust, as said decisions are based, not upon clear evidence herein, but rather upon the court's erroneous presumptions, as argued supra.

Notice is the primary and most fundamental pre-requisite to due process of law under the Fifth and Fourteenth amendments of the United States Constitution.

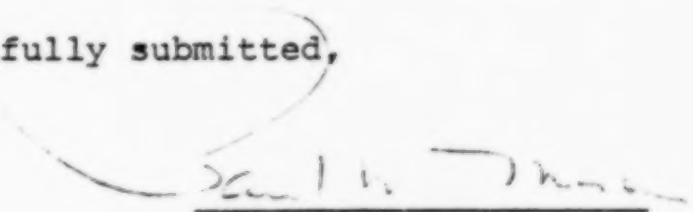
That the very cornerstone of our judicial process requires a person to have notice of any proceeding against them and were by legislative enactment, some other form of notice is allowed beyond personal service, it should be and must be narrowly construed that when one

party is allowed to give notice by registered mail creating a presumption of good service, and that party knows that the mailed notice was not received, then something more is required of that party.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,


Paul W. Mercer
L & M Building
Suite 1
4014 N. 7th Street
Phoenix, Arizona 85014
Attorney for Petitioners

Certificate of Service

STATE OF ARIZONA)
) ss.
County of Maricopa)

Paul W. Mercer, being first duly
sworn, states:

That on the 9th day of March, 1978,
he caused 40 copies of Petition for Writ
of Certiorari to be mailed Air Express,
on behalf of Petitioners, to the following:

Clerk of the Court
Supreme Court of the United States
Supreme Court Building
Washington, D.C. 20530

and that on said day of March, 1978,
he caused 3 copies of said Petition to
be mailed, regular mail, postage paid,
to the following:

Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

Signed this 9th day of March, 1978.

Paul W. Mercer
Paul W. Mercer
A citizen of U.S.
over the age of 21

Subscribed and Sworn to before me this
9th day of March, 1978.

Charles A. Miller
Notary Public

My Commission expires:

My Commission Expires May 26, 1981

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 6379-76

RICHARD A. WILSON and SHARON
L. WILSON, et al.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent,

MEMORANDUM SUR ORDER

Filed: December 6, 1976

Before: DAWSON, Chief Judge

On December 2, 1976, petitioners filed a "Motion for Reconsideration of Findings" requesting that the Court reconsider its Order dated November 3, 1976, denying the motion of petitioners Paul W. Mercer and Florence L. Mercer for leave to file a second amendment to their petition which would place the taxable year 1971 in controversy herein.

A statutory notice of deficiency

covering the year 1971 was mailed, as required by law, to Paul W. and Florence L. Mercer at their last known address on April 13, 1976. The time for filing a timely petition seeking a redetermination of the deficiency for the year 1971 expired 90 days later, i.e., July 13, 1976. Separate notices of deficiencies covering the year 1972 were also mailed to Mr. and Mrs. Mercer on April 13, 1976, and they both filed a timely petition for that year on July 8, 1976. Thus the Court has jurisdiction of the year 1972 but not for 1971.

Rule 41(a), Tax Court Rules of Practice and Procedure, provides for liberal amendments to pleadings except for certain areas relating to the petition which concern the jurisdiction of the Court. Our jurisdiction is limited with respect to (1) the taxpayers whose tax deficiency may be redetermined and (2) the years for which such redetermination may pertain. As to the years over which the Court has jurisdiction, a case is fixed by a petition as originally filed or as amended within the statutory period (90 days from the mailing of the deficiency notice) for filing the petition, and thereafter it may not be changed by amendment to include a different tax year.

Here the motion for leave to file the document lodged as a second amendment to the petition, attempting to invoke our jurisdiction as to the year 1971, was not received by the Court until September 27, 1976, which

was well beyond 90 days from the date (April 13, 1976) the notice of deficiency covering 1971 was mailed to the Mercers. Consistent with Rule 41(a), Tax Court Rules of Practice and Procedure, and in accord with our opinion in Richard A. O'Neil, 66 T.C. 105 (1976), it is concluded that this Court lacks jurisdiction over the Federal income tax deficiencies and penalties of Paul W. and Florence L. Mercer for the taxable year 1971. Therefore, it is

ORDERED: That the "Motion for Reconsideration of Findings" is denied.

/s/
Howard A. Dawson, Jr.
Chief Judge

Dated: Washington, D.C.
December 6, 1976

A1

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1660

RICHARD A. WILSON and SHARON
L. WILSON, et al.,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

OPINION

Petition to Review a Decision
of the Tax Court of the
United States

Filed: November 25, 1977

Before: BROWNING, GOODWIN
and KENNEDY, Circuit Judges

The Commissioner of Internal Revenue disapproved certain adjustments made in respect to partnership income for the tax year 1972

and issued deficiency notices for that year. The appellants, who are individual taxpayers in the partnership, then filed a single, joint petition in the Tax Court challenging that determination. Ten Does were also named as petitioners. Upon the Commissioner's motion, the Tax Court dismissed the Does for lack of jurisdiction and struck a paragraph in the petition relating to unnamed persons not before the court. The appellants appeal those orders. We dismiss the appeal for lack of jurisdiction. It is now generally understood that courts of appeals will review only final decisions of the Tax Court. Porter v. C.I.R., 453 F.2d 1231, 1232 (5th Cir. 1972); see 26 U.S.C. §7482(a). Where, as here, there has been no decision concerning the tax liability of any of the parties for the year 1972, we can entertain no appeal. In addition, the Tax Court ruled in essence that it could not consider the cases of unknown, unnamed persons who were in no way before the court. This court can do no more than the Tax Court. We cannot rule on the status of fictitious persons.

Appellants Paul W. Mercer and Florence L. Mercer additionally appeal the order of the Tax Court denying their motion to amend the petition to contest the Commissioner's separate determination of a deficiency for the tax year 1971.

This court has jurisdiction to

consider the Mercers' appeal from this order. The order had the effect of dismissing the Mercers' petition as to 1971 for lack of jurisdiction. A decision of the Tax Court dismissing a petition for lack of jurisdiction is reviewable in this court on appeal. See 26 U.S.C. §§7459(c), 7482(a), (1967 & Supp. 1977). Dismissal of a petition to contest a deficiency for lack of jurisdiction because of late filing leaves the Commissioner's determination of tax liability for the year in question final, and unreviewable by the Tax Court. Rosewood Hotel Inc. v. C.I.R., 275 F.2d 786, 788 (9th Cir. 1960). See 26 U.S.C. §6213(c) (1967). On the facts in this case, therefore, the Tax Court's order is a final decision on the cause of action arising out of the Commissioner's determination of a deficiency for 1971, cf. Commissioner v. Sunnen, 333 U.S. 591, 595 (1948), and is appealable. See Miami Valley Coated Paper v. C.I.R., 211 F.2d 422 (6th Cir. 1954). Cf. Fed. R. Civ. P. 54(b).

On the merits, we conclude that the Tax Court was correct in denying the Mercers' leave to amend the petition.

A notice of deficiency for 1971 was mailed to the Mercers on April 13, 1976. The Mercers' motion was filed September 27, 1976. The motion was not filed within the required 90-day

period. 26 U.S.C. §§ 6212, 6213. Once the 90-day period has run, an existing petition cannot be amended to contest the Commissioner's determination of a deficiency for the additional year. Kennedy v. C.I.R., 339 F.2d 335, 337 (7th Cir. 1964); O'Neil v. C.I.R., 66 T.C. 105 (1976); Estate of Archer, 47 B.T.A. 228 (1942).

Appellants claim they did not receive the notice of deficiency. */ They argue the 90-day period did not begin to run until they received actual notice of the existence of a deficiency on September 6, 1976, and their petition to the Tax Court was therefore timely.

*/ The Tax Court proceeded on the basis that appellants' claim is only that they did not receive the notice of deficiency, not that no notice was issued. If appellants' claim is that a notice of deficiency was never issued, the result would be the same. If the Commissioner did not issue a notice of deficiency for 1971, the Tax Court would be without jurisdiction to redetermine appellants' tax liability for that year and affirmance would be required on this ground. See Lang v. United States, 423 U.S. 161, 165 n.4, 1976; Dudley v. C.I.R., 258 F.2d 183 (3rd Cir. 1958). Cf. Delman v. C.I.R., 384 F.2d 929, 934 (3rd Cir. 1967).

We cannot agree. Section 6212 authorizes mailing the notice of deficiency by certified or registered mail to the last known address of the taxpayer. Absent a claim of failure to comply with the statutory procedure, the 90-day period for petitioning the Tax Court commences on the date of mailing. There is no requirement that the taxpayer actually receive the notice of deficiency or have actual notice of the claimed deficiency. See DeWells v. United States, 378 F.2d 37, 39 (9th Cir. 1967); Cohen v. United States, 297 F.2d 760, 775 (9th Cir. 1962). Appellants do not challenge the date of mailing, or allege any failure to comply with the statutory procedure. The Tax Court correctly held that the 90-day period for petitioning for redetermination of the claimed deficiency for 1971 began to run on April 13, 1976 and that the Mercers' motion for leave to amend the petition was therefore untimely.

Appellants claim the Tax Court's denial of leave to amend their petition denies them due process. Actual notice of a deficiency is not required because taxpayers who contest the Commissioner's determinations have alternate remedial routes. They can seek to have the deficiency redetermined in the Tax Court; or pay the assessed sum and sue for a refund in the United States District Court. Although failure to file a petition in the Tax Court within

90 days of the mailing of a notice of deficiency forecloses a remedy in that court, the doors of the district court remain open. For the same reason, it cannot be said that inability to have one's case heard in the Tax Court is a denial of due process. See Phillips v. Commissioner, 283 U.S. 589, 597-98 (1931); Cohen v. United States, supra, 297 F.2d at 772.

The order of the Tax Court relating to the Mercers' claim for the year 1971 is affirmed. The appeal from other orders is dismissed for lack of jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1660

RICHARD A. WILSON and SHARON
L. WILSON, et al.,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

ORDER

Filed: January 13, 1978

Before: BROWNING, GOODWIN
and KENNEDY, Circuit Judges

The Petition for rehearing is
denied.

AUG 2 1978

MICHAEL RODAK, JR., CLERK

No. 77-1755

In the Supreme Court of the United States

OCTOBER TERM, 1978

PAUL W. MERCER and FLORENCE L. MERCER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT***

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1755

PAUL W. MERCER and FLORENCE L. MERCER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

Petitioners seek review of the Tax Court's order denying them leave to amend their petition to contest the Commissioner's determination of a federal income tax deficiency for 1971.

The Commissioner properly mailed separate statutory notices of deficiency for 1971 and 1972 to petitioners on April 13, 1976 (R. 54-55, 67-81).¹ On July 8, 1976, petitioners joined several other persons in filing a petition in the Tax Court contesting the Commissioner's determinations only with respect to 1972 (R. 1-3). On September 27, 1976, petitioners sought to enlarge their petition to encompass a challenge to the Commissioner's determination for 1971 as well (R. 31-34). Since petitioners did not seek to enlarge their petition within 90 days of the mailing of the notice of deficiency for 1971,

¹"R." refers to the duplicated record in the court of appeals.

the Tax Court held that it lacked jurisdiction to redetermine the deficiency for 1971 (R. 86-87). The court of appeals affirmed (Pet. A1-A6).

Petitioners argue (Pet. 11-13) that they never received the notice of deficiency for 1971 and that the 90-day period for filing a Tax Court petition prescribed by Section 6213 of the Internal Revenue Code of 1954 did not begin to run until they received actual notice on September 6, 1976, that a deficiency for that year had been determined against them. They accordingly concluded that their attempt to amend their petition to include 1971 was therefore timely. But the courts have uniformly held that actual notice of a tax deficiency need not be received before the 90-day period within which a petition in the Tax Court may be filed begins to run. See, e.g., *Lewin v. Commissioner*, 569 F. 2d 444 (C.A. 7), certiorari denied, June 19, 1978 (No. 77-1452); *Berger v. Commissioner*, 404 F. 2d 668, 672 (C.A. 3), certiorari denied, 395 U.S. 905; *DeWelles v. Commissioner*, 378 F. 2d 37, 39 (C.A. 9), certiorari denied, 389 U.S. 996; *Brown v. Lethert*, 360 F. 2d 560, 562 (C.A. 8); *Luhring v. Glotzbach*, 304 F. 2d 556, 558 (C.A. 4); *Pfeffer v. Commissioner*, 272 F. 2d 383, 384 (C.A. 2); *Williams v. United States*, 264 F. 2d 227, 228-229 (C.A. 6), certiorari denied, 361 U.S. 862. Indeed, Section 6213(a) of the 1954 Code specifically provides that the petition must be filed within 90 days "after the notice of deficiency authorized in section 6212 is mailed" (emphasis added). Moreover, petitioners do not dispute the correctness of the Tax Court's finding that the notice of deficiency in question was properly mailed to them.²

²Section 6212(a) of the 1954 Code (26 U.S.C.) authorizes the Commissioner to send the notice of deficiency to a taxpayer by certified or registered mail, and Section 6212(b)(1) provides that the notice of deficiency shall be sufficient if mailed to the taxpayer at his

Petitioners further argue (Pet. 16-19) that the Tax Court's refusal to entertain their claim for 1972 deprived them of their right to due process. But the courts have consistently rejected the contention that the statutory requirement that a Tax Court petition be filed within 90 days after the notice of deficiency is mailed violates due process. See, e.g., *Lewin v. Commissioner*, *supra*, 569 F. 2d at 445; *Cohen v. Commissioner*, *supra*, 297 F. 2d at 772; *Brown v. Lethert*, *supra*, 360 F. 2d at 562; *Drake v. Commissioner*, 554 F. 2d 736, 739 (C.A. 5). See also *Berger v. Commissioner*, *supra*, 404 F. 2d at 674. A proceeding in the Tax Court is an alternative, not an exclusive, means of challenging the Commissioner's deficiency determinations. A taxpayer may also contest a determination by paying the tax and bringing an action for refund in the appropriate district court or of the Court of Claims. Such refund suit procedures fully satisfy the requirements of due process. *Flora v. United States*, 357 U.S. 63, 75; *Phillips v. Commissioner*, 283 U.S. 589, 595-599; *Cheatham v. United States*, 92 U.S. 85, 88-89.³

last known address. As the Ninth Circuit pointed out in *Boren v. Riddell*, 241 F. 2d 670, 672:

*** the purpose of using registered [or certified] mail is *first*, to provide the safest economical method of insuring that in the greater majority of cases, notice is actually received by the taxpayer from his Government; *second*, to create some commonly accepted factual basis to permit, in good conscience, the initiation of the ninety day period against the taxpayer, without requiring the Government to face the almost impossible task of *proving* actual notice to the taxpayer.

Accord, *Cohen v. United States*, 297 F. 2d 760, 772 (C.A. 9), certiorari denied, 369 U.S. 865.

³Contrary to petitioners' assertion (Pet. 14-15), the Commissioner has not taken inconsistent positions in this case. The Commissioner's motion to dismiss certain unidentified parties (John Does 1-5 and Jane Does 1-5) from the Tax Court proceeding (R. 22-25) was based

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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upon the fact that no notices of deficiency had been sent to such parties. Without the issuance of a notice of deficiency, the Tax Court lacks jurisdiction. See *Laing v. United States*, 423 U.S. 161, 165 n. 4.